


FTB’s petition alleges that there was insufficient evidence to support the portion of the Opinion that reversed FTB’s proposed assessment related to capital gains income realized prior to 2010. FTB concedes that appellants may show error in FTB’s determination independent of whether error in the final federal determination is shown. (See *Appeal of Surrey House, Inc.*, (80-SBE-047) 1980 WL 4975.) FTB also does not dispute that some of the transactions included in its proposed assessment for 2010 occurred prior to the 2010 taxable year. However, FTB asserts that unless appellants provide a complete copy of their federal closing agreement, FTB and OTA are unable to determine the reasons appellants agreed to include capital gains transactions from 2004 and 2007 in their 2010 federal closing agreement.

To find that there is an insufficiency of evidence to justify the opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, OTA clearly should have reached a different result. (*Appeal of Swat-Fame, Inc., et al.*, 2020-OTA-045P.)


The Opinion based its conclusion only in part on the terms of the federal closing agreement. It states that “appellants have presented sufficient evidence to rebut [the presumption of correctness attending FTB’s determinations], including sales agreements, stock certificates, IRS auditor’s workpapers, and the pages of the closing agreement that reflect transactions which occurred in prior years.” That evidence clearly showed that the two capital gains transactions at issue occurred in 2004 and 2007, and not in 2010. Furthermore, in its petition, FTB concedes that the evidence supports OTA’s conclusion that the transactions occurred in a prior year. Contrary to FTB’s assertion that the entire federal closing agreement is needed, appellants’ reasons for agreeing at the federal level to recognize the 2004 and 2007 capital gains transactions in 2010 are irrelevant to the Opinion’s conclusion. As stated in the Opinion, “[j]ust as FTB is not bound to follow the federal determination (see *Appeal of Der Wienerschnitzel International, Inc.*, (79-SBE-062) 1979 WL 4104), appellants may show on appeal that a proposed assessment based on a final federal determination is incorrect. (See *Appeal of Surrey House, Inc., supra.*)”

Accordingly, OTA finds that FTB has not established grounds to grant a rehearing, and its petition is denied.


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Teresa A. Stanley
Administrative Law Judge

We concur:

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Asaf Kletter
Administrative Law Judge

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Josh Lambert
Administrative Law Judge

Date Issued: 2/22/2023